82-627

Office - Supreme Court, U.S.
FILED
OCT 7 1982
ALEXANDER L. STEVAS,
CLERK

No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
*Petitioners,*

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES DURYEA, JR.
(COUNSEL OF RECORD)
50 California Street
Suite 955
San Francisco, CA 94111
(415) 981-1361

*Attorney for Petitioners, James M. Thomsen, Travis Gatus, John M. Brennan, Jerald R. Jakl, Larry R. Johnson, Anthony T. Pellegrino*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTIONS PRESENTED FOR REVIEW

1. Is there an exception to the rule that separate corporations affiliated by common ownership have ability to conspire in violation of the Sherman Act?

2. Assuming characterization of three separate economic entities as a "common enterprise", does said characterization exempt from the Sherman Act an agreement between the member companies to restrain competition in markets in which defendants are actual or putative competitors?

3. Are agreements to blacklist and to boycott natural persons from employment opportunities the type of agreements prohibited by section 1 of the Sherman Act?

4. Do natural persons who are the intended victims of employer agreements to blacklist and to boycott have standing to sue their employer for enlisting said agreements for the purpose of excluding competition in the separate, related market in which the victims' services are sold by the employer?

## PARTIES

The names of the parties to the action in this Court are the same as stated in the caption.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions presented for review | i |
| Parties | i |
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statutes involved | 2 |
| Statement of the case | 3 |
| A. The parties | 3 |
| B. Competitive conditions | 5 |
| C. Blacklisting agreements and boycotts of plaintiffs | 7 |
| D. Decisions below | 10 |
| Reasons for granting the writ | 11 |
| A. The decision contravenes rules of conspiracy of this court governing separate corporations affiliated by common ownership or control | 11 |
| B. The decision of the ninth circuit directly conflicts with decisions of the third and fifth circuits concerning ability of commonly owned companies to conspire in violation of the Sherman Act | 14 |
| C. In fashioning a "common enterprise" exemption, the decision below is in conflict with a recent decision of the second circuit and is contrary to cisions of this court | 16 |
| D. The decision of the ninth circuit is contrary to decisions of this court and is in conflict with decisions of the sixth and eighth circuit courts of appeal as to whether the challenged agreements are prohibited by section 1 of the Sherman Act | 17 |
| E. The decision below on the issue of standing is contrary to decisions of this court | 20 |
| Conclusion | 22 |

## TABLE OF AUTHORITIES CITED

### Cases


| | Page |
|---|---|
| Anderson v. Shipowners Assn. of the Pacific, 272 U.S. 359 (1926) | 18 |
| Associated Press v. United States, 326 U.S. 126 (1945) | 16 |
| Blue Shield of Virginia v. McCready, ..... U.S. ....., 102 S.Ct. 2540 (1982) | 21 |
| Blumenthal v. Shaw, 77 F. 954 (3d Cir. 1897) | 19 |
| Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975) | 15 |
| Columbia Metals v. Kaiser Aluminum, 579 F.2d 20 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978) | 15 |
| Continental T.V. & G.T.E. Sylvania, Inc., 433 U.S. 36 (1977) | 18 |
| Cromar Co. v. Nuclear Materials & Equip. Co., 543 F.2d 501 (3d Cir. 1976) | 15 |
| Dyers case, 2 Hen. V, 5 pl. 26 (1415) | 19 |
| Flood v. Kuhn, 407 U.S. 258 (1972) | 18 |
| Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949) | 20 |
| Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980) | 15 |
| H & B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 (5th Cir. 1978) | 15 |
| Hilton v. Eckersley, 6 El. and Bl. 47, aff'd 6 El. and Bl. 66 | 19 |
| Huston v. Rentlinger, 91 Ky. 333 (1891) | 19 |
| Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) | 12, 13 |
| Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) | 20 |

## Table of Authorities Cited

### Cases

Page

Mandeville Island Farms v. Sugar Co., 334 U.S. 219 (1948) ..... 21

Mattison v. Lake Shore and M.S. Ry. Co., 3 Ohio Dec. (1895) ..... 19

National Society of Prof. Engineers v. United States, 435 U.S. 679 (1978) ..... 14, 15, 17, 18

North American Soccer v. National Football League, 670 F.2d 1249 (2d Cir. 1982) ..... 16

Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64 (1894) ..... 19

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 ..... 13, 14

Radovich v. National Football League, 352 U.S. 445 (1957) ..... 18, 21, 23

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) ..... 12

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) ..... 16

Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) ..... 20

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 19

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) ..... 13

United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955) ..... 20

United States v. International Boxing Club of New York, Inc., 358 U.S. 242 (1959) ..... 18

United States v. Yellow Cab, 332 U.S. 218 (1947) ..... 12

## Table of Authorities Cited

### Statutes


| | Page |
|---|---|
| 15 U.S.C.: | |
| Section 1 | passim |
| Section 2 | 2, 3, 10, 14, 20, 21 |
| Section 15 | 3 |
| 28 U.S.C. Section 1254(1) | 2 |


### Rules


| | |
|---|---|
| Supreme Court Rules: | |
| Rule 17.1(a) | 14 |
| Rule 17.1(c) | 11 |


### Other Authorities


| | |
|---|---|
| 2 Areeda & Turner, Antitrust Law, pp. 198-199 (1978) | 19 |
| 1979 Fortune 500 List of the Largest Industrial, Financial Institutions in the United States | 4 |

No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
*Petitioners,*

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY, AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*James M. Thomsen, Travis Gatus, John M. Brennan, Jerald R. Jakl, Larry R. Johnson, Anthony T. Pellegrino, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.*

## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, which was entered on March 30, 1981 is reported at 512 F.Supp. 128 and is attached to this Petition as Appendix A. The opinion of the

United States Court of Appeals for the Ninth Circuit, attached as Appendix B, is reported at .....F.2d....., No. 81-4190 (9th Cir., July 6, 1982).

## JURISDICTION

The judgment of the Ninth Circuit was entered on July 6, 1982. A timely petition for rehearing and suggestion for rehearing en banc was filed on July 20, 1982, and was denied by the Ninth Circuit in an order dated August 17, 1982, attached as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

## STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1981), attached as Appendix D, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any person, one hundred thousand dollars or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1981 Supp.), attached as Appendix E, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire to with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on

> conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. 1981), attached as Appendix F, provides in relevant part as follows:

> Any person who shall be injured in his business of property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

Petitioners brought this antitrust action in the United States District Court for the Northern District of California in September 1979, and alleged that Western Electric Co., Inc. (Western Electric) The Pacific Telephone and Telegraph Company (Pacific Telephone or Pacific) and American Telephone and Telegraph Company (A.T.&T.) conspired to blacklist and exclude them from employment opportunities at Pacific Telephone in violation of Section 1 of the Sherman Act (R. 1-13). Petitioners alleged that their common employer, Western Electric, enlisted agreements to boycott with their prospective employer, Pacific Telephone, in violation of attempt to monopolize and monopolization provisions of Section 2 of the Sherman Act (R. 5).

### A. The Parties

Petitioners are telecommunications craftsmen, and have practiced their craft for eight to fifteen years. (R. 1190-

1200; 1235-38; 1243-72). All began their occupations as employees of Western Electric. (*Id.*).

Western Electric is a corporation organized and existing under the laws of the state of New York (R. 1279). Western Electric is one of the largest industrial organizations in the United States and was ranked seventeenth on the *1979 Fortune 500 List of the Largest Industrial, Financial Institutions in the United States* (R. 1281-82). It owns seven subsidiary corporations (R. 1278-79). Western Electric is a wholly-owned subsidiary of A.T.&T. (R. 2). Its affairs are managed by its Board of Directors which has no members from either A.T.&T. or Pacific Telephone (R. 1283; 1288).

In Northern California, Western Electric sells, as a labor contractor, services for the installation and maintenance of telephone equipment of its own manufacture as well as its competition (R. 1290-92). Services are sold by hourly, per capita fees (R. 1490-97). These specialized services have been marketed and sold to General Telephone, United States Government, A.T.&T., Pacific Telephone and Central Telephone in Nevada (R. 1290; 1303-04). Western Electric employs 1250 individuals to perform the telecommunication services in Northern California (R. 1297).

By its own admission, Western Electric operates with complete autonomy in its installation line of business and in employment matters (R. 1290; 1312-13). A.T.&T. has issued no directives with respect to either of these activities since 1972 (R. 1308).

Pacific Telephone is a corporation organized and existing under California law (R. 2-3). During the time period at issue, A.T.&T. owned 90.11 percent of its common stock

and 11.0 percent of preferred stock (R. 1333-34; 1368). Pacific Telephone stock was publicly traded on the New York Stock Exchange (R. 1348). The largest private employer in California, Pacific employs craftspersons to install, test and maintain telephone equipment (R. 1349-50).

Pacific Telephone paid a fixed percentage of gross revenues to A.T.&T. in exchange for A.T.&T.'s advisory services pursuant to "license contracts" (R. 1334, 1368). Pacific is free to accept, modify or reject A.T.&T.'s advice (R. 1166-67). Company policies are established by Pacific's Board of Directors (R. 1352), which is composed of fourteen individuals from other organizations in California and one officer of A.T.&T. (R. 1335, 1346).

A.T.&T. is a New York corporation (R. 3). In addition to its sale of advisory services to Pacific Telephone and other telephone operating companies, A.T.&T. owns and operates long distance telephone lines (R. 1335-36). A.T.&T. employs craftspersons to maintain this equipment (R. 1335). No officer, director or employee of Pacific Telephone is a member of its Board of Directors; Donald Procknow, Western Electric's president, is a member. (R. 1387-88).

**B. Competitive Conditions**

The telecommunications industry in Northern California is divided into two segments: (1) regulated segment in which Pacific and other telephone companies possess exclusive monopoly rights to dial tone services in designated geographic areas and (2) unregulated segment encompassing both sale of inter-city long distance service and sale and/or lease of business telephone equipment, e.g., private branch exchange equipment (R. 1336-39). Pacific

possesses at least ninety percent market share in both segments in the Northern California area (R. 1407; 1426-27).

Western Electric has been the exclusive outside contractor for telecommunications services to Pacific Telephone in the Northern California area, thereby realizing over 94 million dollars in annual revenues (R. 1478-79). Pacific Telephone refused to deal with Western's competitors on the basis that Western Electric's prices for the services were lower (R. 1502). The key to Western's maintenance of lower prices is its retention of a large population of skilled craftspersons. Experienced craftspersons usually complete work more efficiently and profitably, and per capital cost of training replacements is estimated at $30,000 (R. 1449; 1452-3; 1456-57; 1460-61).

As a result of Pacific's dominant buying power and Western's exclusive relationship with Pacific, these defendants controlled more than ninety-five percent of the employment market for the services of skilled telecommunications craftspersons in Northern California (R. 1130, 1296-97, 1405, 1816).

By their own admissions, Western Electric and Pacific compete against each other in the sale of services for installation and maintenance of both business telecommunications equipment and central office equipment (R. 1445; 1516; 1536-38; 1513-17; 1540; 1579; 1584).

In 1978, Pacific experienced a critical shortage of skilled craftspersons necessary to meet burgeoning services and equipment demand (R. 1706; 1717-20). Pacific recruited skilled craftspersons employed by Western Electric to meet that demand (R. 1584). The blacklisting and other

restraints here in dispute arose to eliminate actual and potential competition between Western Electric and Pacific Telephone for the services of petitioners and other skilled telecommunications craftspersons (R. 1767-69; 1579-83; 1778-82; 1273; 1616-17).

### C. Blacklisting Agreements and Boycotts of Plaintiffs

Petitioners were required to deal with Pacific Telephone as a separate entity. Pacific's policy was to treat employees of Western Electric as "someone off the street" (R. 1374-1378). There was no inter-company transfer procedure (R. 1331).

Under Pacific Telephone's stated company policy, petitioners' employment with Western Electric was irrelevant; Western crafts employees were to be hired if "best qualified". (R. 1311-13; 1363; 1400; 1757; 1584-87; 1756-59.)

On March 7, 1978, Mr. Pellegrino was found, through usual pre-employment testing, "best qualified" and was offered employment as a PBX repair technician by Pacific Telephone in Santa Clara, California (R. 1259-72). Mr. Pellegrino accepted Pacific's offer (R. 1259-72; 1584-87). He gave notice of termination to Western Electric (R. 1767-69). On March 17, 1978, a Western installation manager contacted Pacific and threatened to stop "loaning" personnel unless Pacific cancelled its employment contract with Mr. Pellegrino (R. 1579-83). A Pacific employment manager then telephoned Mr. Pellegrino, cancelled the employment contract, and told Mr. Pellegrino that there was an "agreement" between Western and Pacific whereby Pacific would not hire individuals employed by Western unless the employee resigned from Western Electric and waited six months (R. 1584-96).

Mr. Johnson's effort to obtain employment with Pacific Telephone followed a similar scenario. After passing the gamut of pre-employment testing, Pacific denied employment by reason of the "six months policy" on July 23, 1978 (R. 1252-55).

In September 1978, Pacific requested advice from ATT regarding policy in hiring or not hiring Western employees (R. 1756-59). ATT recommended Pacific hire if the individuals were the "best qualified" (R. 1756-59; 1584-87). Pacific then recruited skilled craftspersons employed by Western and made employment offers (R. 1584-87). At this time, the other petitioners, Messrs. Thomsen, Gatus, Brennan and Jakl, successfully completed all pre-requisites to employment (R. 1192-1200; 1217-34; 1235-36; 1239-42; 1243-47).

Western Electric's local installation managers discovered Pacific's recruiting and received letters of resignation from skilled craftsmen within its employ (R. 1584-87). With the specific intent to "prevent ongoing recruiting and the loss of skilled installers." (R. 1584-87), Western Electric threatened Pacific with a "raiding war" unless Pacific agreed to stop its recruiting of and employment offers to Western Electric employees (R. 990; 1805-08).

Pacific Telephone again capitulated to threats. Pacific and Western Electric agreed no *current* Western employee would be hired by Pacific without Western first agreeing to "release" the individual from its employ. It was further agreed *former* Western employees would be eligible for employment with Pacific Telephone only after six months expired from the date of separation from Western Electric (R. 1752; 1588). Within 15 days, the "release" device was

replaced by Pacific Telephone's categorical refusal to deal with all individuals presently employed by Western Electric (R. 1756).

Pacific Telephone told plaintiffs that it had no duty to hire even after expiration of the required six months (R. 1645-47). Pacific appreciated individual wage earners could not afford to be without work in their chosen trade for six months (R. 1760; 1765-55).

Western Electric and Pacific Telephone have admitted the restraints at issue to be without redeeming value. Western Electric's documents admitted the restraints are "blacklisting" and contrary to an individual's right to freely pursue employment opportunities (R. 1637; 1634-35). Pacific admitted it was "blacklisting" Mr. Pellegrino (R. 1271-72). Pacific also admitted the six months' lapse to be "invalid", "illegal", and "inconsistent" with Pacific's employment policies (R. 1352, 1634, 1635, 1638-41; 1624-33; 1356-57).

On their face, the restraints have operated to prevent Pacific Telephone from recruiting, negotiating with, or contracting with skilled craftspersons employed by Western Electric (R. 1756; 1584-87; 1559-70; 1579-83; 1617-1633; 1653-1724). In actual effect, petitioners and the 1243 other skilled craftspersons on Western's payroll have been foreclosed from marketing or selling their services in 95 percent of the market (R. 1193-97; 1239-42; 1252-55; 1390-93; 1579-96; 1624-44; 1648-52; 1725-27). By binding plaintiffs and skilled craftsmen to exclusive service, Western Electric has maintained per capita productivity, quality of installation and avoided cost increases and resulting prices increases (R. 1383-86; 1405-09; 1419-31; 1436-67; 1475-76; 1489-1500; 1506-07; 1512-33).

Separate collective bargaining agreements have been entered into by Western Electric, Pacific Telephone and ATT (R. 461-515; 965). The restraints at issue have never been covered by any collective bargaining agreements (R. 461-515).

**D. Decisions Below**

Just prior to trial, after extensive discovery had been completed (including forty-one depositions), respondents moved for summary judgment contending (i) they lacked capacity to conspire, (ii) the restraints were merely "matters of internal management" among affiliated corporations and therefore exempt from conspiracy proscriptions of Sherman Act, § 1, (iii) all antitrust claims were barred by the labor exemption to antitrust laws and (iv) petitioners lacked standing to prosecute the attempt to monopolize and monopolization offenses against Western Electric since appellants were neither customers, suppliers or competition of Western Electric (R. 103-1102). Petitioners responded to all issues with a seventy-two page memorandum accompanied by one hundred twenty-three exhibits (R. 1107-1809).

The District Court sustained respondents' second contention and dismissed the Sherman Act § 1 claim, finding (1) "Pacific, A.T.&T. and Western are sufficiently affiliated to permit the further consideration of whether the challenged activities comprised matters of internal management" (512 F.Supp. at 132) and thereon (2) each restraint alleged was "an integral part of the operation of (Bell System) and is a legitimate concern of those who own and control it." (*Id.*) The District Court also adopted respondents' standing argument and held petitioners lacked standing on the § 2 claims on the ground they were not

competitors or customers of Western Electric (512 F.Supp. at 134).

On appeal, Judge Goodwin, speaking for a unanimous panel of the Ninth Court, affirmed the District Court's decision. The Court of Appeal announced a new test of liability for related corporations:

> "Even if appellees possessed capacity to conspire, the personnel agreements in question do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management . . ." (App. B., p.10b.)

Applying its "internal management" test, the Court found the challenged agreements did "not involve anyone outside the corporate family" and therefore lacked anticompetitive effect as to a matter of law. (App. B., p.12b) In dicta, the court commented, "this case is essentially an effort to turn a labor dispute into an antitrust action for treble damages." (*Id.*)

Affirming summary judgment on the standing issue, the Ninth Circuit concluded plaintiffs' injury was remote and outside the target area since plaintiffs did not compete or purchase from Western (App. B., p.14b-15b). The Ninth Circuit also found lack of "causal connection" between monopolization and the blacklisting agreements in dispute. (App. B., p.15b-16b.)

## REASONS FOR GRANTING THE WRIT

### A. The Decision Contravenes Rules of Conspiracy of This Court Governing Separate Corporations Affiliated By Common Ownership or Control

Rule 17.1(c) of the Rules of this Court provide that one consideration in favor of granting the writ of certirorari

is that the decision below has "decided a federal question in a way in conflict with applicable decisions of this court."

In holding some level of affiliation, by ownership and control, operates to exempt separate corporations from the conspiracy provisions of § 1 of the Sherman Act, the decision below directly contravenes decisions of this Court. This court has squarely held that common ownership or even common control does *not* exempt separate corporations from the conspiracy prohibitions of the Sherman Act.

The principle was enunciated in *United States v. Yellow Cab*, 332 U.S. 218, 227 (1947) as follows:

> "The fact that these restraints occur in a setting described by appellees as a vertically does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form."

The decision in *Yellow Cab* was followed to summarily reject a "single trader" defense asserted in *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948).

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) this Court held that "common ownership and control does not liberate corporations from the impact of the antitrust laws." 340 U.S. at 215. In strik-

ing down a purported "single unit" defense, this Court upheld a jury's finding of price-fixing violations involving two commonly-owned liquor distributors. 340 U.S. at 213-214.

In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), this Court affirmed Sherman Act violations against commonly owned subsidiary companies who conspired to eliminate competition between themselves. The Court noted:

> "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E.g., *Kiefer Stewart co. v. Seagram & Sons, supra*, 340 U.S. at page 215, 71 S.Ct. at page 262. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." 341 U.S. at 598.

The rule found clear expression in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142. Again rejecting the invitation to create a "single trader" immunity to Sherman Act conspiracy liability, this Court held:

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); United States v. Yellow Cab. Co., 332 U.S. 218, 227, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947)." 392 U.S. at 141-142.

The rule applied by this Court that separate incorporations is sufficient to render affiliated corporations potential conspirators not only squares with statutory language of Sherman Act §§ 1 and 2, but also advances the purposes underlying federal antitrust laws. Under this criteria, judicial analysis is properly addressed to the competitive significance of conduct challenged, not the nature and extent of corporate interrelationships. *Nat. Society of Prof. Engineers v. United States, supra*, 435 U.S. 679, 692 (1978).

The decision below grants an immunity for concerted action intended by defendants to eliminate *all* competition in markets in which Western Electric and Pacific Telephone were, by their own admissions, actual or putative competitors, i.e., market for craftspersons' services, market for sale of telecommunications services. This ad hoc immunity for matters labelled "internal management" between affiliated corporate entities is in direct conflict with the long line of applicable decisions by this Court. The immunity postulates a label which precludes review of challenged restraints under *any* standard of Sherman Act analysis.

**B. The Decision of the Ninth Circuit Directly Conflicts With Decisions of the Third and Fifth Circuits Concerning Ability of Commonly Owned Companies to Conspire In Violation of the Sherman Act**

Rule 17.1(a) of the Rules of this Court states that another consideration in favor of granting the writ for certiorari is that the decision of the court below is "in conflict

with the decisions of another federal court of appeals on the same matters . . ." The decision here is in direct conflict with the decisions of the Third[1] and Fifth Circuits[2], as well as other circuits[3].

Following the decisions of this Court, the Third and Fifth Circuits have held prerequisites of conspiracy under § 1 of the Sherman Act are met by presence of two or more legally distinct corporations.

The holdings of the Third and Fifth Circuits, if applied to the facts in this case, would reverse the result reached by the Ninth Circuit. Once the element of conspiracy was met, judicial scrutiny would have addressed the nature and necessary effect of the challenged blacklisting agreements, and, if necessary, the history of the restraints, the market setting in which they occurred and the reasons why they were imposed. Governing standards of antitrust analysis would thus have been applied to assess the probable impact on competitive conditions. *Nat. Society of Prof. Engineers v. United States, supra,* 435 U.S. 479, at 692.

The extensive factual record presented by petitioners established the existence, nature, and necessary effect of each challenged agreement and their anticompetitive purpose, history and effects. Under the decisions of the Third

---

[1] *Columbia Metals v. Kaiser Aluminum*, 579 F.2d 20, 33-34 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978); *Cromar Co. v. Nuclear Materials & Equip. Co.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975).

[2] *H & B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239, 244-45 (5th Cir. 1978).

[3] *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) ("corporation may "conspire" within meaning of Sherman Act with subsidiaries if *held out* as distinct legal entities").

and Fifth Circuits, summary judgment would have been denied.

### C. In Fashioning a "Common Enterprise" Exemption, the Decision Below Is In Conflict with a Recent Decision of the Second Circuit and Is Contrary to Decisions of this Court

The decision below also conflicts with the recent decision of the Second Circuit in *North American Soccer v. National Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982). Rejecting the NFL's assertion of single-enterprise exemption to Section 1 of the Sherman Act, the Second Circuit stated:

> "The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. *North American Soccer v. National Football League, supra*, 670 F.2d at 1257.

In contrast, the decision below creates an exemption to the Sherman Act for agreements between separate corporations for the express purpose and effect of restraining competition in markets where they jointly possess ninety percent shares.

The decision below is also in direct conflict with the decisions of this Court in *Associated Press v. United States*, 326 U.S. 126 (1945) wherein this Court found AP's bylaws in restraint of trade; and *Silver v. New York Stock Exchange*, 373 U.S. 341, 356 (1963), wherein this Court held

that the Exchange alone had violated Section 1 of the Sherman Act.

### D. The Decision of the Ninth Circuit is Contrary to Decisions of This Court and Is in Conflict with Decisions of The Sixth and Eighth Circuit Courts of Appeal as to Whether the Challenged Agreements Are Prohibited by Section 1 of the Sherman Act

The Ninth Circuit's conclusive presumptions of reasonableness once challenged restraints are classified as "matters of internal management" contravenes fundamental standards for analyzing restraints of trade under § 1 of the Sherman Act. This Court has mandated two inquiries be made: (1) are the challenged agreements, by their inherent character and necessary effect, anticompetitive on their face and therefore unlawful *per se;* and (2) whether the evidence of industry facts, the history of the restraints, their purpose and probable effects proves the restraints unduly restrictive of competitive conditions—unlawful under the rule of reason, *Nat. Society of Professional Engineers v. United States, supra,* 438 U.S. 679, 692.

The opinion below does not apply either per se or rule of reason analysis. No judicial review occurred concerning the face of any of the four agreements to determine inherent character and necessary effect. None of petitioners' evidence going to industry facts, the history, purpose and probable effects of defendants' agreements was even considered by either Court below, much less analyzed. The only evidence found relevant were six (6) items showing affiliation of the three corporate respondents.

The Ninth Circuit's classifications of the restraints as "matters of internal management" is nothing more than a

return to talismanic labels and outcome-determinative pigeon-holing so emphatically rejected by this Court in *Continental T.V. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). Dispositive labelling a challenged agreement a "matter of internal management" and therefore reasonable per se represents a total repudiation of the standards of Sherman Act § 1 analysis commanded in *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 692. The classification "matter of internal management" can only be one possible conclusion upon considered analysis of the evidence after per se and rule of reason analysis is completed, not an immunity fashioned before and without any substantive antitrust analysis.

The writ should also be granted because the decision below is contrary to other decisions of this Court. Agreements between employers with monopoly power controlling and restraining the right of natural persons to pursue their trade or occupation have long been held to be one type of agreement proscribed by the Sherman Act. *Anderson v. Shipowners Assn. of the Pacific*, 272 U.S. 359, 363 (1926). Employer agreements to blacklist or boycott employees are actionable under § 1 of the Sherman Act. *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957). Dominant employers, as here, violate federal antitrust laws when they enter into agreements intended to prevent individuals from changing employers and thereby bind individuals to exclusive service to one employer. *United States v. International Boxing Club of New York, Inc.*, 358 U.S. 242 (1959). As noted in *Flood v. Kuhn*, 407 U.S. 258 at 287, n.2. (1972) (Douglas J., dissenting):

> "I use the word 'victim' in the Sherman Act sense, since a contract which forbids anyone to practice his

> calling is commonly called an unreasonable restraint of trade."

Accord, 2 Areeda & Turner, *Antitrust Law*, pp. 198-199 (1978).

Defendants' system of controls over each plaintiffs' career are such unreasonable restraints of trade. The "release" restraint prevents one employer from hiring an employee of another employer unless that other employer assents. The blacklisting agreement results in categorical refusals to deal once the individual's current employment affiliation is known. The "six months lapse" requirement, a restraint which defendants believe "contrary to the right of every individual", "blacklisting" and "illegal", enjoins negotiation and contracting until the arbitrary date is obtained. The impact on the victim is a perpetual restraint throughout his or her career.

Petitioners' action is based on centuries of tradition which have held single restraints on occupation illegal. In the *Dyers case*, 2 Hen. V, 5 pl. 26 (1415), the judge declared null and void an agreement prohibiting Dyer from pursuing his trade in a town for six months. See also, *Hilton v. Eckersley*, 6 El. and Bl. 47, aff'd 6 El. and Bl. 66. Employer boycotts and blacklisting have long been held contrary to the common law in the United States. *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. 64, 67 (1894); *Huston v. Rentlinger*, 91 Ky. 333 (1891); *Mattison v. Lake Shore and M.S. Ry. Co.*, 3 Ohio Dec. (1895); *Blumenthal v. Shaw*, 77 F. 954 (3d Cir. 1897). One purpose of the Sherman Act was to condemn all restraints of trade known at common law and to give an action for compensation to those injured by the restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 51, 54-57 (1911).

The writ should also be granted to resolve a split of decisions within the circuits. In contrast to the Ninth Circuit, decisions of Circuit for the District of Columbia and the Eighth Circuit have struck down similar restraints as violative of § 1 of the Sherman Act, sustaining the right of natural persons to market and sell their services in employment markets free of unreasonable restraints. *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

### E. The Decision Below on the Issue of Standing Is Contrary To Decisions of this Court

The Ninth Circuit held two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations.

The decision below contravenes decisions of this Court. Plaintiffs were the very persons whose trade Western Electric intended to restrain by enlistment of agreements with Pacific Telephone not to employ. One goal of the restraints was to exclude actual and all potential competition in the sale of telecommunications services. This Court has held coercive practices subjecting individuals to unreasonable restraints in the market for their services to be an anticompetitive means of excluding competition in the related, separate market where their services are sold. *United States v. International Boxing Club of New York, Inc., supra*, 348 U.S. 236 (1955). See also, *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949).

By precluding intended and actual victims from antitrust remedy against their employer, the decision below also con-

travenes the principle stated in *Mandeville Island Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948):

> "As we have recognized, the statute does not confine its protection to consumers, or to purchasers, or to competition, or to sellers . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of forbidden practices by whomever they may be perpetrated."

The decision contravenes the rule in *Radovich v. National Football League, supra*, 352 U.S. 445, 454. *Radovich* alleged he was a victim of a blacklist agreement preventing employment with any member team of the NFL. 352 U.S. at 447. The blacklist was alleged a means by which defendants monpolized professional football. 352 U.S. at 448. Recognizing Mr. Radovich's right of action under the Sherman Act, this Court said:

> " . . . this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." 352 U.S. at 454.

The decision below adds requirements beyond congressional intent which deprive petitioners of their right to trial by jury.

This Court recently reaffirmed the principles in *Mandeville* and *Radovich* in *Blue Shield of Virginia v. McCready*, ..... U.S. ....., 102 S.Ct. 2540, at 2545 (1982). In *Blue Shield*, the Court said:

> "Consistent with congressional purposes, we have refused to engraft artificial limitations on the § 4 [Clayton Act] remedy." ..... U.S. ....., 102 S.Ct. at 2545.

By confining remedies for Sherman Act § 2 violations only to customers and competitors, the decision below

creates such artificial limitations which this Court has expressly rejected, and defeats public policy favoring active enforcement of the antitrust laws by natural persons.

## CONCLUSION

For the reasons stated in this Petition, the writ of certiorari should be granted and the decision of the Ninth Circuit reversed.

Respectfully submitted,

JAMES DURYEA, JR.
(COUNSEL OF RECORD)
*Attorney for Petitioners,*
*James M. Thomsen,*
*Travis Gatus, John M.*
*Brennan, Jerald R. Jakl,*
*Larry R. Johnson,*
*Anthony T. Pellegrino*

**(Appendices follow)**

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Action No. C-79-2781 RPA

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals

Plaintiffs

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendants

OPINION AND ORDER

This is an action in which six installers employed by Western Electric Co., Inc. (Western) claim that certain personnel policies restricting employee movement within the Bell Telecommunictions System (the Bell System) violate

the antitrust laws. Each plaintiff sought transfer to the Pacific Telephone and Telegraph Company (Pacific), but transfer was denied based upon the so-called "no-switching" agreements between Western and Pacific, which are discussed more fully below. Plaintiffs have brought suit under §§ 1 and 2 of the Sherman Act.

Background.

The record before the Court establishes the following undisputed facts. American Telephone and Telegraph Company (AT&T) is the parent company of the Bell System. The Bell System is comprised of AT&T, Western, Bell Telephone Laboratories, and twenty-three operating telephone companies, including Pacific. AT&T owns and operates connecting telecommunications lines and together with the Bell operating companies furnishes nationwide

long distance service. Pacific, an 89.9% owned subsidiary of AT&T, provides telephone service within California. Western, which is wholly-owned by AT&T, manufactures telecommunications equipment for sale to the Bell operating companies, installs that equipment, and acts as a purchasing agent for the Bell System.

Plaintiff's Claims.

Section 1 of the Sherman Act makes unlawful "every contract, combination..., or conspiracy in restraint of trade." 15 U.S.C. § 1. Section 2 of the Sherman Act renders illegal the activities of "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize...." 15 U.S.C. § 2.

Plaintiffs' § 1 claim alleges that Western, Pacific, and AT&T have conspired to restrain trade or commerce by:

1. An agreement that Pacific would not consider for employment or employ any crafts employees of Western for any employment openings at Pacific;

2. An agreement that no crafts employee of Western would be hired by Pacific for a period of six months following said employee's separation from Western;

3. An agreement that no crafts employee would be hired by Pacific without Pacific first obtaining a release from Western; and

4. An agreement not to compete for each other's crafts labor force. (See Complaint at ¶ 18).

The Instant Motion.

Defendants bring this motion for summary judgment arguing that:

1. Defendants, as one unified

corporate structure, lack the ability to conspire as required by § 1;

2. Even if defendants possessed the ability to conspire, the alleged restraints are not actionable under § 1 because they are activities integral to the operation of the entire Bell System;

3. The alleged restraints affect only labor and hence are not actionable under the antitrust laws; and

4. The plaintiff employees lack standing to sue Western for monopoly offenses under § 2.

To dispose of this motion, it is only necessary that the Court discuss points 2 and 4.

The § 1 Claim.

Section 1 of the Sherman Act prohibits conspiracies in restraint of trade. To prove that such a conspiracy existed, the "concerted action of distinct

economic entities" must be established. Knutson v. Daily Review, Inc., 548 F.2d 795, 802 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed. 2d 1094 (1977). Although a sole actor is incapable of conspiracy, a single corporate structure which is divided into distinct economic units may possess the ability to conspire. See Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951). ("Common ownership and control does not liberate corporations from the impact of the antitrust laws.") But "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 456 (9th Cir. 1977). See Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979). To determine

whether there exists sufficient corporate unity to render an organization incapable of conspiracy, "a court must examine the particular facts of the case before it." Las Vegas Sun, Inc. v. Summa Corp., supra, 610 F.2d at 617. "To 'conspire' within the meaning of the Sherman Act, corporate entities must be sufficiently independent of each other for their concerted action to raise antitrust concerns." Id. Even where a unified corporate structure has the requisite ability to conspire, however, there can be a violation of § 1 "only if the evidence shows their agreement or common action to lack a legitimate business purpose and to have an anticompetitive effect." Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841, 860 (N.D. Cal. 1979). Where the alleged conspiracy is found to have a legitimate business aim, but is

also claimed to render an "incidental and indirect adverse effect upon the business of some competitors," the agreement is tested under the rule of reason. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1003 (9th Cir. 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed. 2d 256 (1973). See Las Vegas Sun, Inc. v. Summa Corp., supra, 610 F.2d at 619.

Since actions of affiliated companies which relate strictly to the internal operations of the common enterprise inherently have a legitimate business purpose and lack anti-competitive effects (because they are not directed at outsiders to the corporate family), such actions cannot constitute a § 1 violation. See Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Sukpp. at 860; In Re Penn Central Securities Litigation, 367 F. Supp. 1158,

1166 (E.D. Pa. 1973); REA Express v. Alabama Great Southern R. Co., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976); Columbia Metal, Etc. v. Kaiser Alum, Etc., 579 F. 2d 20, 34 n. 49 (3d Cir. 1978). Of course, for there to exist matters of internal management, the related companies must satisfy a threshold test of affiliation. For example, Firm A and Firm B- totally unrelated by common control or operation- could not argue successful that a restraint effectuated by them was a matter of "internal management", for they are separate entities; their joint actions could never constitute the required "activities inherently connected with common ownership or control..." Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. To determine whether companies are sufficiently connected to warrant a finding

that they are capable of engaging in affairs of internal management, the Court must consider the degree to which the enterprise's operations are integrated. If basic commonality or control and operation is suggested by this analysis, the threshold criterion is met. Such a finding depends not upon any patent formula, but upon an examination of the facts of each individual case. Cf., Las Vegas Sun, Inc. v. Summa Corp., supra.

The Court finds that Pacific, AT&T and Western are sufficiently affilitated to permit the further consideration of whether the challenged activities comprised matters of internal management. In Pacific Telephone and Telegraph Co. v. Franchise Tax Board, 7 Cal. 3d 544, 546, 102 Cal. Rptr. 782, 498 P.2d 1030 (1972), the California Supreme Court characterized the Bell System as "a

group of affiliated corporations engaged in a unitary communications business". The F.C.C. has held that the Bell System is "centrally managed by AT&T and the AT&T General Department" and that "virtually all important policies and practices are centrally developed, reach(ing) all parts of the Bell System." AT&T, 64 F.C.C. 1, 13 n. 21 (1977). The instant record evidences further and more specific rationale to treat the three defendants as members of a unified enterprise:

1. The Bell companies file a single consolidated federal income tax return;

2. It is the corporate policy of AT&T to represent itself as one unified organization, with all correspondence, facilities, etc., displaying the common Bell System logo (equipment manufactured by Western bears the engraved legend "Bell System property");

3. Research and development of products and services is coordinated by AT&T through Bell Laboratories for the whole system;

4. Training of management and non-management personnel is routinely conducted on a system-wide basis; and

5. Western and the operating companies loan both management and non-management personnel to one another on a routine basis.

Although there are other features which underline the intimate affiliation of the Bell companies, the above elements suffice to establish that AT&T, Western and Pacific are adequately related for them to have engaged in affairs of "internal management".

Given that the defendant companies are sufficiently affiliated for there to exist matters of internal management

within their enterprise, the Court finds that the challenged restraint is protected from the dictates of § 1 because it represents "an integral part of the operation of (the Bell System) and is a legitimate concern of those who own and control it."1/ Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. The conduct challenged here, the structural deployment and coordination of manpower within the Bell System, is inherent to the organization's internal management.

---

1/The Court has chosen not to address the issue of whether the defendants had the ability to conspire. Assuming for the purposes of argument that defendants could have conspired, the Court has decided to focus upon whether the alleged conspiracy is actionable under § 1.

To require that manpower decisions be made totally independently, and to disallow coordination of policies among the companies, could seriously handicap operation of the Bell System.2/

---

2/"Common ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by Section 1 such as production, distribution and price. Indiscriminate application of Section 1 to commonly owned or controlled corporations could therefore have absurd and counter-productive results, subjecting them to liability for 'automatically self-proving conspiracy' on account of activity necessarily arising out of or inherently connected with common ownership or control." Murphy v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860.

"Certainly, an inflexible approach requiring competition within a single business unit, although composed of legally separate entities would introduce chaos, not promote competition." Kitner, An Antitrust Primer, 30 (1964). Several cases support the Court's conclusion in their recognition that despite the existence of an ability to conspire among affiliated companies the exercise of the internal management function does not represent a cause of action under § 1. In Murphy Tugboat, for example, the court held that pricing was an "integral part of the operation..." and absolved two commonly owned and controlled corporations from § 1 liability. Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. Similarly, the allocation of territories and markets among related companies in In Re Penn

Central Securities Litigation, supra, 367 F. Supp. at 1166, was held to be "merely internal management of a single business enterprise" and not actionable under § 1. See REA Express v. Alabama Great Southern R. Co., supra, 427 F. Supp. at 1166; Beckman v. Walter Kidde & Company, 316 F. Supp. 1321 (E.D.N.Y. 1970); Syracuse Broadcasting Corporation v. Newhouse, 319 F. 2d 683 (2d Cir. 1963).

The internal management rule is simply a gloss upon the § 1 requirement that to be actionable, a conspiracy must lack a legitimate business purpose and have an anti-competitive effect. See Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860; DuPont Glore Forgan, Inc. AT&T Co., 437 F. Supp. 1104, 1115-16 (S.D.N.Y. 1977). Exercise of internal management charac-

teristically represents a legitimate business aim. Moreover, such activity is not anticompetitive since its internality confines any impact within the corporate family. Activities inherently connected with common ownership or control by their very definition fall outside the single instance where the conspiracy of affiliated companies would be actionable under § 1: "where the conspiracty between the related corporations involves predatory or coercive conduct directed toward outsiders." Von Kalinowski 16 Business Organizations: Antitrust Laws and Trade Regulation, § 6.01(2), 6-37 (1980). See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) p. 34 ("Nothing (in the Supreme Court decisions) should be interpreted as justifying the conclusion that concerted action solely between a

parent and a subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates § 1"). Cf. Chastian v. AT&T Co., 401 F. Supp. 151 (D.D.C. 1975) (where the alleged conspiracy involved the Bell System's actions toward customers and competitors). The deployment and coordination of personnel within the Bell System were internal affairs, and not predatory practices. Hence, since the challenged restraints had legitimate business purposes and lacked anticompetitive effects, by virtue of their status as activities inherently connected with common ownership and control of the corporations, summary judgment on the § 1 claim must be granted.

The § 2 Claim.

A plaintiff lacks standing to sue in

antitrust unless his alleged injury fell within the "target area" of defendant's conduct. See In Re Multidistrict Vehicle Air Pollution M.D.L. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045, 94 S. Ct. 551, 38 L.Ed. 2d 336 (1973). "...Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63, 92 S. Ct. 885, 891, 31 L.Ed. 2d 184 (1972). Where the alleged unlawful conduct is only remotely connected to the injury claimed by plaintiff, standing is to be denied. See John Lemore & Co. v. Olympia Brewing Co., 550 F. 2d 495 (9th Cir. 1977). It is well settled within the Ninth Circuit that employees lack standing to sue their employer under § 2 of the Sherman Act unless the labor or employment market is the tar-

get of the alleged violation. See Gutierrez v. E.& J. Gallo Winery Co., Inc., 604 F.2d 645 (9th Cir. 1979); Contreras v. Grower Shipper Vegetable Assn. of Central Cal., 1971 CCH Trade Cases ¶ 73,592, p. 90,452, affirmed per curiam, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed. 2d 490 (1974); Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed. 2d 377 (1979). Standing in such instances is denied because "the alleged conduct of the defendant, in its relation to these plaintiffs, is too remote..." Gutierrez v. E.&J. Gallo Winery Co., Inc., supra, 604 F.2d at 646. See Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951).

The above principles require the Court to deny plaintiffs' standing to sue

Western for its alleged monopolization of "the market for manufacture, distribution, sales and installation" of telephone systems. (See Complaint at ¶ 18). Plaintiffs' § 2 claim refers not to the labor market, but to a product market. Hence, Western's employees were not the target of the alleged violation. They did not compete with Western or purchase from it. Any injury they suffered "was merely incidental to the alleged antitrust violation and was not within the area of the economy that the defendant should have foreseen would be affected by its violation." Solinger v. A&M Records, Inc., supra, 586 F.2d at 1312. Accordingly, plaintiffs, as employees who fall outside the target area of the alleged violations, lack standing to sue under § 2.

Conclusion.

Careful examination of the record

reveals no facts to support plaintiffs' claims that defendants violated § 1 of the Sherman Act. Plaintiffs' "version of the facts (fails to) support a viable legal theory which entitles them, if accepted, to a judgment as a matter of law." Mutual Fund Investors v. Putman Management Co., 553 F.2d 620, 624 (9th Cir. 1977). See Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 672 (9th Cir. 1980) ("Summary judgment may be properly granted in an antitrust action on an allegation of conspiracy where there are understandable and legitimate business reasons for a defendant's conduct.") Although the Court is well aware that summary procedures in antitrust actions are to be exercised cautiosly, in "the absence of any significant probative evidence tending to support the complaint," a defendant's motion should be granted. First National

Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed. 2d 569 (1968).

Neither is the Court pursuaded that the plaintiffs have standing to sue under § 2 of the Sherman Act.

Accordingly, IT IS HEREBY ORDERED that defendants' motion for summary judgment on plaintiffs' claims is granted.

Robert P. Aguilar
United States District
Judge of the Northern
District of California

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

Action No. 811-4190

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals,

Appellants

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

OPINION

Before: Goodwin and Anderson, Circuit Judges, and Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

Goodwin, Circuit Judge.

Plaintiffs appeal from a summary judgment in favor of Western Electric, Pacific Telephone, and American Telephone and Telegraph Co.

The central issues are: (1) whether the defendants were entitled to judgment as a matter of law on plaintiffs' claims of violations of § 1 of the Sherman Act; and (2) whether the plaintiffs had standing to sue Western for alleged violations of § 2 of the Sherman Act. Six employees filed a private antitrust action in district court claiming that the defendants contracted, combined, and conspired to restrain interstate trade and commerce in violation of § 1 of 15 U.S.C. § 1. Specifically, the employees claimed; (1) that there was an agreement that Pacific would refuse to consider, to negotiate with, or to employ any craft person employed by Western, (2) that Pacific agreed with

Western not to employ any Western craft employee unless he or she resigned from Western and waited for six months; (3) that Pacific and Western agreed not to employ any craft person from Western without first seeking a release from Western; (4) that Pacific and Western agreed not to compete for craft employees of either company; and (5) these agreements were enforced by blacklists and refusals to deal.

The employees also claimed that Western violated § 2 of the Sherman Act, 15 U.S.C. § 2, by initiating and inducing the alleged contracts, combinations and conspiracies as an unlawful means of maintaining monopoly power in the sale of telecommunications services and telephone equipment. These claims were joined with a variety of pendent state claims asserting various theories of recovery.

In granting summary judgment on the antitrust claims, the court also dismissed the pendent state claims without prejudice.1/

Generally, summary judgment is disfavored in "complex antitrust litigation where motive and intent play leading roles..." Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962). Accord, Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 668 (9th Cir. 1980). Harvey v. Fearless Farris Wholesale, Inc., 589 F. 2d 451, 454 (9th Cir. 1979).

---

1/ Plaintiffs also alleged that the agreement, between AT&T, Western, and Pacific violated Section 7 of the California Constitution and constituted intentional interference with prospective economic advantages. The district court's ruling on the state law claims has not been appealed.

Poller does not, however, preclude summary disposition of antitrust cases. First Nat. Bank v. Cities Service, 391 U.S. 253, 290 (1968). This court has said, in connection with applying Fed. R. Civ. P. 56(c) to antitrust cases:

> "Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper." Mutual Fund Investors v. Putman Management Co., 553 F.2d 620, 624 (9th Cir. 1977) quoting ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975).

Accord: Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d at 454.

In granting summary judgment on the § 1[2]/ claims, the district court found the

---

2/ Section 1 of the Sherman Act, 15 U.S.C. § 1 provides:

> "Section 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

employment restraints to be protected from antitrust liability because AT&T, Pacific and Western are so closely affiliated within the Bell System as to make employment policy a matter of internal management. AT&T owns 100 percent of the shares of Western and 90 percent of the shares of Pacific.

A conspiracy requires a "plurality of actors concerting their efforts toward a common goal". Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 625 (9th Cir. 1977). Common ownership and control will not insulate corporations from the impact of antitrust laws if they "hold themselves out as competitors". Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 215 (1951). Accord: Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134, 141-142 (1968); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); William

Inglis v. ITT-Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d at 456. However, the mere fact of separate incorporation, without more, is not "sufficient to prove the capability of conspiracy".

On the capacity of intra-enterprise entities to conspire, this court has held that there is a single "business unit separated by the technicality of separate incorporation" where the parent and subsidiary corporations are controlled by a single individual. Knutson v. Daily Review Inc., 548 F.2d 795, 802-03 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). Two factors in Knutson are arguably made the corporations legally incapable of conspiracy, (1) common ownership and discretion and (2) lack of intra-enterprise competi-

tion.3/ See also Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841, 858, affirmed sub nom, Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981). "To determine whether cor-

---

3/ Murphy Tugboat v. Merchants Towboat, 467 F. Supp. 841, 859 n. 15, affirmed sub nom, Murphy Tugboat v. Crowley, 658 F.2d 1256 (9th Cir. 1981), indicates that there is some confusion over who should determine the capacity issue:

> "The capacity issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it. On reflection, it seems to the Court to be more of a legal than factual issue (at least where, as here, none of the relevant facts are disputed) and hence more properly resolved by the Court, but there appear to be no reported decisions on this question."

It is not necessary to reach this question in this case.

porate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it." Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617, cert. denied, 447 U.S. 906 (1980).

Even if appellees possessed the capacity to conspire, the personnel agreements in questions do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management. See William Inglis v. ITT-Continental Baking Company, 668 F.2d 1014; Murphy Tugboat Co. v. Crowley, 467 F. Supp. at 860. Thus, actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1.

The evidence that AT&T, Western and Pacific constituted a "common enterprise"

is overwhelming. (1) The FCC has held that Bell System was "centrally managed by AT&T". The parent company, "virtually sets all policies and practices" in the Bell System. AT&T, 64 F.C.C. 2d 1, 13, n.21 (1977). See also Pacific Telephone and Tel. Co. v. Franchise Tax Board, 102 Cal. Rptr. 782 (1972). (2) The Bell System filed a single, consolidated federal income tax form. (3) AT&T had a corporate policy of representing itself and the other Bell companies as a single enterprise with a common logo ("The Bell System"). (4) Bell laboratories develop products and services for the entire system. (5) Western and local operating companies continuously lend management and nonmanagement personnel. (6) Labor negotiations between the Bell companies and the union, the Communications Workers of America, were conducted on a systematic

basis. The plaintiffs present no plausible evidence to counter the district court's findings and conclusions.

The employment agreements did not involve anyone outside the "corporate family". The companies had no policy concerning the movement of skilled employees outside the Bell System. "Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Report of the Attorney General's National Committee to Study the Antitrust Laws 34 (1955). We agree.

This case is essentially an effort to turn a labor dispute into an antitrust action for treble damages. The plaintiffs wanted to change employers with all their seniority and benefits intact. The proper place for a dispute of this kind is

at the bargaining table between Bell and its employees' union. The defendants raised the labor exemption to the anti-trust laws as a defense in the district court but the district court did not address this argument and we need spend no more time on it.

C. Standing Under Section 2

The district court also found that the plaintiffs lacked standing under § 2 of the Sherman Act4/, because their

---

4/ Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> § 2. Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony,

alleged injury did not fall within the target area of defendants' conduct. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973). The plaintiffs had alleged that Western monopolized the market for sales, distribution, manufacture and installation of telephone systems. The district court found that the allegation referred only to the product market and not the labor market. The employees did not compete or purchase from Western, so they were

---

> and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

not the target of the alleged violation. Any injury suffered was incidental.

The employees also attempted to tie the § 2 claim with the § 1 claim. This court has said that a § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim. Bushie v. Stenocord Corporation, 460 F.2d 116, 121 (9th Cir. 1972).

A further infirmity in the § 2 claim is the absence of a causal connection between the alleged monopolization and the personnel policies. In Ostrofe v. Crocker, 670 F.2d 1378 (9th Cir. 1982), the court stated that an employee dismissed because he refused to participate in a conspiracy to rig prices and allocate customers has standing to bring a private treble damage action against the employer under § 4 of the Clayton Act, 15 U.S.C. § 15. But Ostrofe does not

help plaintiffs in this case. There is no discernible causal connection between the alleged injury (monopolization of telecommunications services and equipment) and the personnel agreements attacked under § 1. Limitations on the mobility of skilled labor within the Bell System do not affect Western's alleged monopolization. Indeed, these limitations may make workmen more available to competing companies. This result would be procompetitive. Accordingly, contriving standing in this case would accomplish nothing to further enforcement of the antitrust laws.

AT&T, Western and Pacific are closely affilitated to comprise a common enterprise. The personnel agreements challenged by these plaintiffs are matters of internal policy with no anti-competitive effect on those outside the corporate

family. The district court's summary judgment on the § 1 claims is affirmed. Because plaintiffs lacked standing to sue under § 2 and because the alleged monopolization is not causally related to the injuries alleged, summary judgment on the § 2 claim is also correct.

Affirmed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

Action No. 811-4190

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals,

Appellants

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

ORDER

Before: Goodwin and Anderson, Circuit Judges and Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the case en hanc.

The petition for rehearing and the suggestion for rehearing en banc are denied.

Dated: August 17, 1982.

## APPENDIX D

Section 1 of the Sherman Act, 15. U.S.C. § 1, states:

> "§ 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

## APPENDIX E

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> "§ 2. Monopolizing trade a felony; penalty
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

## APPENDIX F

Section 4 of the Clayton Act, 15 U.S.C. § 15, states:

> "§ 15. Suits by persons injured; amount of recovery
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-627

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS,
JOHN M. BRENNAN, JERALD R. JACKI,
LARRY R. JOHNSON, ANTHONY T. PELLEGRINO,
*Petitioners,*

vs.

WESTERN ELECTRIC CO., INC.,
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Respondents' Brief in Opposition to Petition for a Writ of Certiorari

NOBLE K. GREGORY
*Counsel of Record*
JOE C. CREASON, JR.
JAMES B. YOUNG
MICHAEL H. SALINSKY
*Counsel for Respondents*

225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1177

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
*Of Counsel*

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

## QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that internal management practices concerning the transfer of personnel within defendants' "corporate family" do not violate Section 1 of the Sherman Act—consistent with the decisions of this Court and the Courts of Appeals?

2. Is the decision below on the issue of standing consistent with the decisions of this Court?[1]

---

1. The parties are set forth in the title; respondents Western Electric Co., Inc. and The Pacific Telepone and Telegraph Company are wholly owned subsidiaries of respondent American Telephone and Telegraph Company, which in turn owns stock in the following publicly owned corporations:
Southern New England Telephone Company
Cincinnati Bell, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement of the Case | 1 |
| Argument | 3 |
| I. The ruling below—that internal management practices concerning the transfer of personnel within defendants' "corporate family" do not violate Section 1 of the Sherman Act—is consistent with the decisions of this Court and the Courts of Appeals | 4 |
| II. The court below did not rule that only customers and competitors have standing to assert Sherman Act Section 2 violations. In any event, the court below properly ruled that, independent of any standing issue, the monopolization alleged by petitoners was not causally related to petitioners' alleged injuries | 6 |
| Conclusion | 7 |

# TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| AT&T, 64 F.C.C.2d 1 | 2 |
| Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 | 4, 5 |
| Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134 | 5 |
| United States v. Yellow Cab. Co., 332 U.S. 218 | 5 |

**Statutes**

| | |
|---|---|
| Sherman Act | |
| Section 1 (15 U.S.C. § 1) | 2, passim |
| Section 2 (15 U.S.C. § 2) | 2, passim |

No. 82-627

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS,
JOHN M. BRENNAN, JERALD R. JACKL,
LARRY R. JOHNSON, ANTHONY T. PELLEGRINO,
*Petitioners,*

vs.

WESTERN ELECTRIC CO., INC.,
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Respondents' Brief in Opposition to Petition for a Writ of Certiorari

### STATEMENT OF THE CASE

Petitioners' statement of the facts contains many assertions not supported by the record. The relevant facts, which are summarized in the opinions of the district court and the Court of Appeals, are as follows:

Respondent American Telephone and Telegraph Company ("AT&T") is the parent company of the Bell System (Pet.Appx., p. 2a). The Bell System includes AT&T, respondent Western Electric Co., Inc. ("Western Electric"), and twenty-three operating telephone companies, including respondent The Pacific Telephone and Telegraph Company ("Pacific") (Pet.Appx., p. 2a). Western Electric, a wholly

owned subsidiary of AT&T, manufactures and installs telecommunications equipment for, and acts as a purchasing agent for, the Bell System companies (Pet.Appx., p. 3a). Pacific, which was an 89.9% owned subsidiary of AT&T during the time in question[2], provides telephone service within California (Pet.Appx., p. 3a).

The Bell System is "centrally managed by AT&T" and "virtually all important policies and practices are centrally developed, reach[ing] all parts of the Bell System" (Pet. Appx., p. 11a; quoting the FCC's holding in *AT&T* (1977) 64 F.C.C.2d 1, 13, n. 21; Pet.Appx., p. 11b). Thus, for example, the Bell System companies file a single consolidated federal income tax form, use a common logo, and conduct labor negotiations on a system-wide basis (Pet.Appx., pp. 11b-12b). Research and development of products and services is coordinated by AT&T through Bell Laboratories for the whole system (Pet.Appx., pp. 12a, 11b). And, management and nonmanagement personnel are routinely loaned between Western Electric and the local operating companies, including Pacific (Pet.Appx., p. 11b).

Petitioners, six employees of Western Electric, filed an action in the district court alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (Pet.Appx., pp. 2a, 2b-3b). They challenged certain Bell System practices concerning the deployment and coordination of the workforce within the Bell System (Pet.Appx., pp. 1a, 13a). In particular, petitioners claim that restrictions on employee transfer within the Bell System violate the antitrust laws (Pet.Appx., pp. 1a-2a), asserting: 1) that there

---

2. Pacific is now a wholly owned subsidiary of AT&T (see supra, p. i, n. 1).

was an agreement that Pacific would not consider for employment any craft employees of Western Electric; 2) that Pacific agreed not to hire any Western Electric craft employees unless the employee resigned from Western and waited six months; 3) that Pacific and Western Electric agreed that no craft employee from Western Electric would be hired by Pacific without a release from Western; and 4) that Pacific and Western Electric agreed not to compete for each other's craft employees (Pet.Appx., pp. 4a, 2b-3b).

The district court granted defendants summary judgment on the antitrust claims, and dismissed the pendent state law claims without prejudice (Pet.Appx., p. 4b). The Court of Appeals for the Ninth Circuit affirmed (Pet.Appx., pp. 1b-17b). It held that Section 1 of the Sherman Act was not violated because AT&T, Western Electric, and Pacific constituted a "common enterprise" (Pet.Appx., p. 10b) *and*

> [t]he personnel agreements challenged by these plaintiffs are matters of internal policy with no anticompetitive effect on those *outside the corporate family*" (Pet.Appx., pp. 16b-17b; emphasis added).

The Court of Appeals held that plaintiffs' Section 2 claim alleged monopolization of a telephone systems market, for which they lacked standing, and that, in any event, the alleged monopolization of telephone systems was not causally related to the personnel policies in question (Pet.Appx., pp. 14b-17b). On August 17, 1982, the Court of Appeals denied a petition for rehearing (Pet.Appx. C).

## ARGUMENT

Petitioners wholly miss the point. Their argument to this Court is based on their erroneous assertion that the Court of Appeals held that "some level of affiliation, by owner-

ship and control, operates to exempt separate corporations from the conspiracy provisions of § 1 of the Sherman Act" (Pet., p. 12). But the Court of Appeals carefully noted that "[c]ommon ownership and control will not insulate corporations from the impact of antitrust laws if they 'hold themselves out as competitors'" (Pet.Appx., p. 7b; quoting *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211, 215). The decision below did not "fashio[n] a 'common enterprise' exemption" (Pet., p. 16), but instead properly concluded that the actions of the affiliated Bell companies touched only internal operations and had no anti-competitive consequences outside the corporate family.

Contrary to petitioners' erroneous assertion, the Court of Appeals did not hold that only "two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations" (Pet., p. 20). In any event, the decision below on petitioners' Section 2 claim was also based on the independent ground that there was no causal connection between the alleged monopolization and the challenged personnel policies.

## I. THE RULING BELOW—THAT INTERNAL MANAGEMENT PRACTICES CONCERNING THE TRANSFER OF PERSONNEL WITHIN DEFENDANTS' "CORPORATE FAMILY" DO NOT VIOLATE SECTION 1 OF THE SHERMAN ACT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In rejecting petitioners' argument that defendants' personnel practices violated Section 1 of the Sherman Act, the Court of Appeals held that these "are matters of internal policy with no anti-competitive effect on those outside the corporate family" (Pet.Appx., pp. 16b-17b). The record demonstrates that the employment practices challenged by petitioners involved no one outside the Bell System "corporate family"; the defendant companies had no policies concerning movement of employees outside the Bell System (Pet.Appx., p. 12b).

Petitioners erroneously characterize the decision below as holding that common ownership or common control grants defendants an immunity from the conspiracy provisions of Section 1 (Pet., pp. 11-17). But the court below explicitly recognized that

> "[c]ommon ownership and control will not insulate corporations from the impact of antitrust laws if they 'hold themselves out as competitors.' *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 215 (1951). Accord: *Perma Mufflers v. Int'l. Parts Corp.,* 392 U.S. 134, 141-142 (1968); *United States v. Yellow Cab Co.,* 332 U.S. 218, 227 (1947) • • •" (Pet.Appx., p. 7b).

Petitioners' reliance upon cases holding that two or more legally distinct, but affiliated, corporations have the "ability" to conspire in violation of Section 1 (Pet., pp. 12-14, 15) misses the point: the Court of Appeals ruled that "[*e*]*ven if* [*defendants*] *possessed the capacity to conspire,* the personnel agreements in question do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management" (Pet.Appx., p. 10b; emphasis added), "with no anti-competitive effect on those outside the corporate family" (Pet.Appx., pp. 16b-17b).

Petitioners erroneously assert that Western Electric and Pacific are "actual or putative competitors" (Pet., p. 14) and that the Bell System's personnel policies were intended to eliminate competition between Western and Pacific in the markets for craftspersons' services and the sale of telecommunications services (Pet., p. 14). The record is to the contrary (see Excerpt of Record (9 Cir.) pp. 276, 357-358, 627-629, 713, 871-872, 875-876, 1302-1303).

There is no basis for petitioners' contention (Pet., pp. 14, 15, 16-17) that the court below failed to examine the competitive purpose and effect of the challenged practices. At most, petitioners quarrel with the Court of Appeals' analysis of the undisputed facts; it is beyond dispute that the

legal principles applied by the Court of Appeals are in accord with the decisions of this Court and the various Court of Appeals decisions cited by petitioners.

Petitioners also contend that the ruling below is inconsistent with various decisions holding that restraints on the right to pursue an occupation violate Section 1 and common law (Pet., pp. 18-20). Again, petitioners fail to come to grips with the distinction between practices which lawfully affect an employee's mobility within a "corporate family" and practices which blacklist employees with other employees. As the Court of Appeals pointed out, the Bell System's personnel transfer policy "restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, [thus] Section 1 is not violated" (Pet.Appx., p. 12b).

## II. THE COURT BELOW DID NOT RULE THAT ONLY CUSTOMERS AND COMPETITORS HAVE STANDING TO ASSERT SHERMAN ACT SECTION 2 VIOLATIONS. IN ANY EVENT, THE COURT BELOW PROPERLY RULED THAT, INDEPENDENT OF ANY STANDING ISSUE, THE MONOPOLIZATION ALLEGED BY PETITIONERS WAS NOT CAUSALLY RELATED TO PETITIONERS' ALLEGED INJURIES.

Petitioners alleged in their claim under Section 2 of the Sherman Act that Western Electric monopolized the market for sales, distribution, manufacture and installation of telephone systems (Pet.Appx., p. 14b). Contrary to petitioners' assertion, the Court of Appeals did not hold that only "two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations" (Pet., p. 20). The decision below made no mention of any such limitation upon Section 2 claims (see Pet.Appx., pp. 13b-16b). Thus, petitioners' argument that a requirement limiting Section 2 standing to customers and competitors would "contraven[e] decisions of this Court" (Pet., p. 20) is wholly irrelevant.

In any event, the Court of Appeals also rejected petitioners' Section 2 claim on an independent ground not involving the purported issue of standing suggested by petitioner. The Court of Appeals held that "[a] further infirmity in the § 2 claim is the absence of a causal connection between the alleged monopolization and the personnel policies" (Pet.Appx., p. 15b). The record simply does not show that the personnel transfer policies challenged by petitioners affected or furthered any alleged monopolization by Western Electric of a telephone systems market.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NOBLE K. GREGORY
*Counsel of Record*

JOE C. CREASON, JR.
JAMES B. YOUNG
MICHAEL H. SALINSKY
*Counsel for Respondents*

PILLSBURY, MADISON & SUTRO
*Of Counsel*

Office - Supreme Court, U.S.
FILED
NOV 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-627

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
*Petitioners,*

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY, AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
*Respondents.*

## PETITIONERS' REPLY BRIEF

JAMES DURYEA, JR.
(COUNSEL OF RECORD)
50 California Street
Suite 955
San Francisco, CA 94111
(415) 981-1361
*Attorney for Petitioners, James M. Thomsen, Travis Gatus, John M. Brennan, Jerald R. Jakl, Larry R. Johnson, Anthony T. Pellegrino*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## TABLE OF CONTENTS


| | Page |
|---|---|
| Argument | 1 |
| I. The challenged agreements did violate § 1 of the Sherman Act. The decision of the Ninth Circuit is not consistent with the decisions of this court or the Courts of Appeals | 5 |
| II. The express language of the decision below confines standing under § 2 of the Sherman Act to customers and competitors of the violator. The casual connection between the challenged agreements and § 2 offenses is direct | 8 |
| Conclusion | 9 |

## TABLE OF AUTHORITIES CITED

### Cases


| | Page |
|---|---|
| Bishop v. Wood, 426 U.S. 341 (1976) | 1 |
| Blue Shield of Virginia v. McCready, ..... U.S. ....., 102 S.Ct. 2540 (1982) | 10 |
| Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975) | 5 |
| Columbia Metals v. Kaiser Aluminum, 579 F.2d 20 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978) | 5 |
| Cromer Co. v. Nuclear Materials & Equip. Co., 543 F.2d 501 (3d Cir. 1976) | 5 |
| Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980) | 9 |
| H & B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 (5th Cir. 1978) | 5 |
| Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) | 5, 6 |
| Mandeville Island Farms v. Sugar Co., 334 U.S. 219 (1948) | 10 |
| Nat. Society of Professional Engineers v. United States, 435 U.S. 679 (1978) | 8 |
| North American Soccer v. National Football League, 670 F.2d 1249 (2d Cir. 1982), cert. pending, Case No. 81-2296 | 5 |
| Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981) | 9 |
| Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) | 5, 6 |
| Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) | 1 |

## Table of Authorities Cited

### Cases


| | Page |
|---|---|
| Radovich v. National Football League, 352 U.S. 445 (1957) | 9, 10 |
| United States v. Diebold, 369 U.S. 654 (1962) | 1 |
| United States v. Yellow Cab Co., 332 U.S. 218 (1947) | 5, 6 |


### Statutes


| | |
|---|---|
| Sherman Act: | |
| Section 1 | 4, 5 |
| Section 2 | 8 |


### Other Authorities


| | |
|---|---|
| Sullivan, Antitrust (1977), p. 328 | 8 |

No. 82-627

# In the Supreme Court

OF THE

# United States

---

OCTOBER TERM, 1982

---

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
*Petitioners,*

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY, AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
*Respondents.*

---

## PETITIONERS' REPLY BRIEF

---

## ARGUMENT

Respondents' initial assertion— "petitioners' statement of the facts contains many assertions not supported by the record" (Opp. Br., p. 1)—is, in fact, *not* supported by the record.

Respondents' rendition of "relevant facts" (Opp. Br., pp. 1-2) misapplies basic standards of appellate review. Because the District Court granted summary judgment against petitioners, it is petitioners' version of the facts—not that of respondents—which is to be accepted by this Court. *Bishop v. Wood*, 426 U.S. 341, 347 (1976). The correct standard is that the record below is to be examined in the light most favorable to petitioners to determine the existence of a triable issue of material fact. *United States v. Diebold*, 369 U.S. 654, 659 (1962); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

Respondents' statement that "the Bell System is 'centrally managed by AT&T' and 'virtually all important policies are centrally developed' reaching all parts of the Bell System' " (Opp. Br., p. 2) implies that the agreements here at issue originated with AT&T and comprised common policy. But the record clearly contradicts the position taken by respondents and the Ninth Circuit. The record contained the following deposition testimony of Mr. T.J. Saenger, president of Pacific Telephone:

> "Q. Do you, as President of Pacific Telephone, receive directives from AT&T as to how to administer certain areas of your responsibility?
>
> "A. Your term is too precise. The term "directive" is too precise. We get input. We have suggestions. We get practical suggestions, staff input. And then it is up to PT&T to accept, reject, modify.

(R. 1166)

* * * * * * * * *

"Q. PT&T receives advice from AT&T and then makes its own decision as to what course to take. Is that a fair summary?

"A. That's a general fair summary of the situation".

(R. 1166-67).

AT&T does not manage the operations of Western Electric's installation division in Northern California: AT&T has not issued any directives to that division during the past ten years. (R. 1308).

AT&T did not "develop" the agreements between Western Electric and Pacific Telephone to blacklist and to boycott petitioners from all employment opportunities with Pacific Telephone. The history of the restraints proved the exact opposite; Western Electric, acting alone, coerced Pacific Telephone into the challenged agreements. This history and Western Electric's motive for enlisting the agreements is stated in an intra-company memorandum from a local manager to the regional manager of Western Electric's installation division in Northern California and Western Nevada, dated October 26, 1978.

"On October 23, 1978, I was advised that Telephone Company plant personnel have been actively recruiting our installers for hire in the Pacific Company. C.A. Robert [another local Western Electric manager] also had a recent similar situation.

"I contacted Ken Stevens, Division Manager-Employment for the Pacific Company—Northern Region; and he indicates they must hire our installers if they are the most qualified.

"Since I have already had one installer give notice and several others that have been contacted and are considering hiring on with Pacific Company, I decided to alert J.J. Polosky [Western Electric administrative

> officer for Western Region] on October 24. I suggest we discuss this situation and follow up on whatever arrangement we might deem feasible to prevent ongoing recruiting and the loss of skilled installers."

(R. 1584).

Mr. Roberts of Western Electric then contacted Mr. Stevens of Pacific Telephone and stated Western Electric would raid skilled employees of Pacific unless Pacific agreed to stop its recruiting and offers of employment to craftspersons employed by Western Electric. (R. 1805-06).

On November 2, 1978, Pacific Telephone reversed its "best qualified" criteria for hiring individuals employed by Western Electric—the criteria recommended by the parent company (AT&T) several weeks earlier. (R. 1752, 1757). A business record of Pacific Telephone admits two of the challenged restraints then imposed:

> "A job offer *will not* be made to a Western Electric employee without obtaining approval for release from his/her supervisor . . .
>
> "In addition, *former* Western Electric employee should not be rehired by us unless six months has elapsed since their date of resignation from Western Electric." (R. 1752) [Emphasis in original].

On November 28, 1978, another directive of the employment division of Pacific Telephone substituted the "release" device with a categorical ban against contracting with any individual employed by Western Electric. The directive states:

> "Effective immediately, do not contact Western Electric supervisors to obtain release dates . . .
>
> "This means that applications from current Western Electric employees will be accepted and placed in our pending files. However, we will not consider these people for employment as long as they are still em-

ployees of Western Electric or have resigned from Western Electric within the past six months." (R. 1756).

Pacific Telephone's records also admit a "verbal agreement between Western Electric and PT&T that we will not consider hiring any Western Electric employee for any of our job openings" (R. 1588) *and* a "long-standing agreement "between Western and Pacific whereby Pacific will not engage former employees unless six months has expired from the date of resignation from Western Electric. (R. 1617).

The record thus controverts respondents' erroneous assertion that the restraints arose from a centralized policy handed down by the parent company. The evidence discloses one subsidiary corporation enlisted a second into agreements not to trade with third persons for the purpose of eliminating all actual and potential competition in markets where respondents possess 95% monopoly power.

Respondents' attempt to create the impression that the Ninth Circuit applied substantive standards of Sherman Act § 1 analysis to the challenged agreements (Opp. Br., p. 3) is belied by a reading of the decision. The opinion makes clear the finding of "common enterprise" constituted the explicit premise and sole basis for the determination that the challenged agreements were "matters of internal policy" and therefore produced no anticompetitive as a matter of law. (Pet.Appx., pp. 10b, 16b-17b).

## I. The Challenged Agreements Did Violate § 1 of the Sherman Act. The Decision of the Ninth Circuit Is Not Consistent With the Decisions of this Court or the Courts of Appeals

Although respondents contend the decision below is "consistent with the decisions of this Court and the Courts of Appeals" (Opp. Br., p. 4), they fail to cite a single decision of any Court of Appeals to sustain their position. This is so because there is no decision by any Court of Appeals which, as here, holds restraints per se lawful upon finding corporations "so closely affiliated as to comprise a common enterprise." (Pet.Appx., pp. 16b-17b). In fact, the decision below is in direct and irreconcilable conflict with the decisions of the Second,[1] Third[2] and Fifth Circuits.[3]

Respondents erroneously contend the decision of the Ninth Circuit is consistent with three applicable decisions of this Court.[4] (Opp. Br., p. 5). Respondents' erroneous premise is that *Kiefer-Stewart* limited § 1 liability to situations in which separate, affiliated corporations "held themselves out as competitors". (Opp. Br., p. 6). No such limitation can be found in *Kiefer-Stewart*. This Court held:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturer-merchandising unit' makes it impossible for them to have con-

---

[1] *North American Soccer v. National Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982), cert. pending, Case No. 81-2298.

[2] *Columbia Metals v. Kaiser Aluminum*, 579 F.2d 20, 33-34 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978); *Cromer Co. v. Nuclear Materials & Equip. Co.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975).

[3] *H & B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239, 244-45 (5th Cir. 1978).

[4] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons., Inc.*, 340 U.S. 211 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

spired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.G., United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010. The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra,* 340 U.S. 211, at 215.

Moreover, the defendants in *Perma Life Mufflers* were not, and did not hold themselves out, as competitors. This Court, nevertheless, held noncompeting parent and subsidiary corporations capable of conspiracy to violate the Act. 392 U.S. at 141-142. And in *Yellow Cab,* this Court expressly rejected the assertion of a single-trader defense by members of a "vertically related enterprise." 332 U.S. 218, 227.

The factual matrix presented by this case is more compelling than *Kiefer-Stewart, Perma Life Mufflers,* or *Yellow Cab.* Western Electric and Pacific Telephone were actual competitors in two markets in which they jointly possessed 90% market shares. (R. 1130, 1296-97, 1405, 1407, 1426-27, 1816). That they competed in the market for craftspersons' services is demonstrated above at pp. 2-3. That they competed and were potential competitors in the market for sale of installation services is admitted in business records of Western Electric.[8]

---

[8]Western Electric's national "Five Year Plan", dated April 10, 1978, states in pertinent part:

"The potential competition with the telephone companies may extend to all areas of our work and losses are already severe in the PBX line." (R. 1445).

Western Electric's marketing plan, also prepared in 1978, states: "We must provide greater assistance than is normally needed since we are attempting to break into a market where the toughest competitor is the Telco itself." (R. 1540).

Further, evidence presented by petitioners demonstrated anticompetitive purpose and effect. There is no logic or factual basis for respondents' statement that the restraints were not intended to restrain trade other than between Western Electric and Pacific Telephone (Opp. Br., p. 6). The challenged agreements were intended, and did, restrain trade between Pacific Telephone and two distinct groups of independent traders: (1) 1250 individuals employed by Western Electric in Northern California and Western Nevada (R. 1584, 1752, 1756, 1617, 1805-06); and (2) competing sellers of telecommunications services. (R. 1502). Western Electric and Pacific Telephone have admitted the challenged agreements are illegitimate and/or anticompetitive. The record contains a document from the files of Pacific Telephone, *which states:*

> "The requirement for a six month lapse since employment with Western Electric has not been valid for several years and, in fact, is illegal . . . There is *no* union agreement covering this matter." (R. 1624) [Emphasis in original].

The record also contains a document from the files of Western Electric's national personnel director which states:

> "For example, one such rule seems to imply that employees seeking employment with another Bell System Company must resign and wait six months before employment can begin with the other Bell Company. This 'rule' has no official sanction. It is contrary to the right of an employee to seek employment elsewhere in the Bell System or in any other company." (R. 1634-35).

The record also showed an admission by the Board Chairman of Pacific Telephone during 1978 that the "release" agreement was "inconsistent" with official company policy of Pacific Telephone (R. 1355-57).

The erroneous assertion of respondents that the Ninth Circuit did review petitioners' evidence (Opp. Br., pp. 5-6) cannot withstand review of the decision. As respondents' own statement of "relevant facts" makes clear (Opp. Br., pp. 1-2), the only evidence reviewed was that of common ownership and five elements of common control. (See also, Pet.Appx., pp. 10b-12b). Even the proponents of some "internal management rule" recognize limits to the label; as pointed out by Professor L.A. Sullivan, the commentator who coined the "internal management" phrase:

> "At some point a diminished level of business integration between two related corporations will warrant a conclusion that they are two firms even though there are some elements of common ownership and control." Sullivan, *Antitrust* (1977), p. 328.

Not only did the decision below fail to consider petitioners' proof negating common control and functional integration, but the decision did not address any of the material facts of Sherman Act § 1 liability, viz., nature and necessary effects of the challenged agreements and the circumstances surrounding their formation and operation. *Nat. Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). Respondents have not even attempted analysis of the material facts laid down by this Court in *Nat. Society.*

## II. The Express Language of the Decision Below Confines Standing Under § 2 of the Sherman Act to Customers and Competitors of the Violator. The Casual Connection Between the Challenged Agreements and § 2 Offenses Is Direct

Respondents erroneously construe the Ninth Circuit decision in urging standing was not limited to customers and competitors of Western Electric (Opp. Br., p. 6). The language of the decision cannot be interpreted any other way:

"The employees did not compete or purchase from Western, so they were not the target of the alleged violation. Any injury suffered was incidental." (Pet. Appx., pp. 14b-15b).

Respondents also err in arguing absence of causal connection between the challenged agreements and the attempt and monopolization offenses alleged against Western Electric. (Opp. Br., p. 7). The record showed the challenged restraints were a wrongful means of suppressing labor costs and installation prices, thereby preventing competing sellers of specialized business services from trading with Pacific Telephone. (R. 1502, 1450-59, 1464-65, 1466-68, 1584, 1805-06). This Court has recognized the factual nexus between exclusion of individuals from free markets in which to sell their services and their employer's acquisition or preservation of monopoly power in the related market where those services are sold by the employer. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

## CONCLUSION

This case raises questions vital to enforcement of federal antitrust laws. The question of ability of separate corporations affiliated by common ownership and control to conspire within the meaning of the Sherman Act has resulted in conflicting tests among the Circuits.[6] Only the Second, Third and Fifth Circuits follow applicable decisions of this Court. This question is bound to recur with the ever-increasing concentration in the national economy. The standing decision directly contravenes decisions of this

---

[6]The Seventh and Eighth Circuits find ability to conspire only if affiliated corporations hold themselves out as separate entities. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981).

Court,[7] and represents a sharp departure from the common law tradition incorporated into the Sherman Act. The principle that each individual reap the benefits of his or her unique talents free from monopolistic restraints is fundamental to the fabric of a democratic, free society.

All questions presented are ripe for review by this Court. The writ of certiorari should be granted and the decision of the Ninth Circuit reversed.

Respectfully submitted,

JAMES DURYEA, JR.
(COUNSEL OF RECORD)
*Attorney for Petitioners,*
*James M. Thomsen,*
*Travis Gatus, John M.*
*Brennan, Jerald R. Jakl,*
*Larry R. Johnson,*
*Anthony T. Pellegrino*

---

[7] *Blue Shield of Virginia v. McCready*, ... U.S. ..., 102 S.Ct. 2540, 25 2545 (1982); *Radovich v. National Football League, supra*, 352 U.S. 445, 454; *Mandeville Island Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948).